JUSTIN MILROY NARAKERA

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[SELANGOR CRIMINAL APPEAL NO. 51-258-86]
26 MARCH 1990

COMPANY LAW: *Criminal charge against corporation - Section 16A(1)(c) Employment Provident Fund Act - Lacuna in Criminal Procedure Code as to plea by corporation and service of summons - Section 5 Civil Law Act imports English Law - Transposition of individual into shoes of company - Liability to pay arrears of contribution under Employee Provident Fund Act - Director of company - Sections 16A(2), 18(2) Employment Provident Fund Act.*

CRIMINAL PROCEDURE: *Corporations - Plea and service of summons - Lacuna in Criminal Procedure Code - Section 5 Civil Law Act - Whether director can be personally liable for liability of company - Section 322 - Costs to applicant.*

LABOUR LAW: *Arrears under Employment Provident Fund Act - Section 16A - Corporation liable - Whether can be recovered personally from director of company.*

In September 1977, an EPF Inspector K, filed 6 charges against company A for alleged offences under s. 16(A)(1)(c) of the Employees Provident Fund Act 1951 (the Act). When the matter came up for hearing, R appeared as the company's representative and pleaded guilty to the charge. L, who was the prosecutor and EPF officer, advised that the company had paid the amount of RM225 under the charges; he however applied for the payment of arrears for approximately RM74,000. A conviction was entered into and the matter was adjourned for negotiation of payments.

On the adjourned date the appellant N, who was the managing director of A, appeared and agreement was reached as to the method of payment of the RM74,000. The company was also fined and N paid this amount.

In default of the payment of the remaining amounts, a notice of warrant was issued to the company and served on N, who did not turn up on the date fixed. A warrant was then issued not against the company, which was named in the notice, but against N who was not named at all in the notice.

Defence Counsel took a preliminary objection on the basis that the notice was null and void as the company was no longer in existence. This objection was overruled and N filed this appeal naming himself as the appellant and K as the respondent. The High Court remitted the case back to the Magistrate's Court. The Magistrate ordered that N be remanded in custody. N's solicitors applied to the High Court and obtained N's release pending this appeal.

The issue in this appeal is the validity of the order of imprisonment made against N and the personal liability, if any, of N to pay a "fine" which was the primary responsibility of the company.

Held:

[1] Pursuant to s. 380(1) of the Criminal Procedure Code (the Code) and s. 18 of the Act, the first notice of appeal naming K as respondent was misconceived. See also *PP v. R.K. Menon & Anor.* [1978] 2 MLJ 152, *Maleb B. Su v. PP* and *Indran & Anor. v. PP* as to the parameters of what is appealable.

[2] There is a lacuna in the code as to how a corporation is to plead to a charge. By virtue of s. 5 of the code (which imports s. 33 of the UK English Justice Act), the company representative can plead guilty to a criminal charge against a corporation. Therefore a plea from a corporation should be taken in writing by the company's representative and in the absence of same, a plea of not guilty should be entered.

[3] At the hearing there was no proper evidence of the company being defunct; as such the preliminary objection was without proper foundation.

[4] It is the opinion of the Court that before s. 18(2) of the Act can be used the director of the corporation in question had to be formally charged and the ingredients of the section proved against him. The two ingredients required for a *prima facie* case are that the company has committed the offence and that the director was a director at the time the offence was committed.

[5] By transposing N into the shoes of the company without any evidence whatsoever before him of the second ingredient the Magistrate did something which was totally impermissible in law.

[6] The liability to pay the arrears of contributions recoverable as a "fine" was the liability of the company which does not automatically pass on to its directors under s. 18(2) of the Act and is a liability of the employer alone under s. 16A(4) of the Act.

[7] The unwarranted actions which were initiated by the relevant officers of the EPF have caused N his loss of liberty, a great deal of expense, trouble and loss of time. Pursuant to s. 322 of the Code, the Court awarded costs to N, to be paid by EPF.

[Order made by Magistrate held to be null and set aside. Costs to be paid by EPF to the appellant.]

Cases referred to:
PP v. R.K. Menon & Anor. [1978] 2 MLJ 152
Maleb b. Su v. PP [1984] 2 CLJ (Rep) 232
Cheak Yoke Thong v. PP [1984] 1 CLJ (Rep) 87
Indran & Anor. v. PP [1985] 1 MLJ 326
H.M. Treasury v. Harris [1957] 2 QB 516
Pontian Bas Berhad v. PP [1987] CLJ (Rep) 834

Legislation referred to:
Companies Act 1965, s. 350
Criminal Justice Act 1925 [UK], s. 33
Criminal Procedure Code, ss. 129(i)(b), 283, (i)(b), (i)(c), 322, 380(i), 307, 427
Criminal Procedure Code [Sing], s. 267(b)(ii)
Employees Provident Fund Act 1951, ss. 16A(1), (1)(c), 16A(4), 17, 18, 18(2)
Magistrates' Court Rules 1952 [UK], r. 76(3)

For the appellant - J.G. Bernatt; M/s. Bernatt Pereira & Co.
For the public prosecutor - Ibrahim Taib

JUDGMENT

Mahadev Shankar J:

This appeal arises from a sentence of imprisonment imposed upon the appellant by reason of the failure of a company, of which he was a director, to pay contributions under the Employees Provident Fund Act 1951 (the Act).

Kawalan Chergas Sdn. Bhd. (the company), had its registered office in Petaling Jaya. It was incorporated on 14 August 1975 with an authorised capital of RM100,000. Its paid-up capital was only RM82,201.

In September 1977 an EPF Inspector Encik S. Kanesalingam swore a complaint against the company. Summons No. 1443 of 1977 followed. There were six charges. Each was for the failure to remit a particular month's contribution within due time. The sums ranged from RM24 to RM113, and totalled RM275. Only three employees were named in these charges. The period of the offences ranged from 30 November 1975 to 30 June 1977. The offences alleged were against s. 16(A)(1)(c) and punishable under s. 16A(1) of the Act.

On 14 August 1978 the case came up for hearing.

Mr. Teh Boon Eng appeared as defence Counsel. One Mr. M.K. Ramani describing himself as executive consultant appeared as the company's representative. The charge was evidently read to this M.K. Ramani and he pleaded guilty to the "facts as per charge."

The prosecutor an EPF officer named Lee said the company had paid the amount set out in the charges. He then applied for an order for the payment of the arrears amounting to RM74,553.

The learned Magistrate then entered a conviction. Defence Counsel applied for an postponement to enable the managing director to be present to negotiate payments.

The case was then adjourned to 17 August 1978. The appellant Narakera was in Court. In mitigation defence Counsel said there had been a change in personnel and directorship in the company and prayed for leniency.

The EPF prosecutor repeated that there was RM74,553 in arrears from 1975 to March 1978 of which RM46,576 represented employers contributions and RM29,977 employees contributions. The agreement reached was that RM27,977 be paid in three instalments and RM46,576 in twelve instalments.

The Magistrate then fined the company RM250 on each charge, in default three weeks, and further ordered the instalments aforesaid to be paid with effect from 1 September 1978.

Mr. Narakera paid the fine of RM1500 on behalf of the company. The instalments were never paid.

So a notice was issued out by the Court at the instance of the EPF to the company requiring it to attend and show cause why a warrant "to levy a fine by distress and sale should not be issued against you for the execution of the said order." The body of the notice set out the instalments earlier ordered. The last instalment should have been paid on 1 August 1979. This notice was issued out in 1981.

The notice was served on Narakera as the managing director of the company on 21 April 1981. He failed to turn up on 2 June 1981 when the matter was fixed for disposal. So a warrant of arrest was issued not against the company which alone was named in the notice, but against Narakera who was not named in the notice at all. Bail was set at RM10,000. He was subsequently arrested and brought before the Court on 20 July 1981.

Mr. Bernatt was now defence Counsel for Mr. Narakera. Encik Wan Adnan b. Muhamad was the Magistrate. The warrant was struck off. After some adjournments the notice to show cause was eventually argued before this Magistrate on 14 October 1982.

This argument centred upon a purported preliminary objection to the show cause notice. It was based on a letter purportedly from the Registrar of Companies dated 13 October 1982 to defence Counsel's firm to say that the company had been struck off the register on 22 October 1981 (*vide* G.N. 6790). The letter was handed up from the Bar Table and it was submitted that the proceeding to show cause was null and void as the company was no longer in existence.

The Magistrate overruled the preliminary objection and ordered the matter to proceed. Against this order, Mr. Narakera's solicitors filed a notice of appeal.

The Summons No. 1443 of 1977 and the notice to show cause is both against the company. But this notice of appeal names Narakera as the appellant describing him therein as a former managing director of the company dissolved by the Registrar of Companies. The respondent is named as S. Kanesalingan (Inspector) EPF P. Jaya.

Against this purported notice of appeal the learned Magistrate was persuaded to write a formal judgment on 19 November 1983.

The appeal record of his rather novel proceeding came before the High Court. Y.A. Shaik Daud is said to have remitted the matter back to the Magistrate's Court. Precisely what order he made is not before me; nor the date on which he made it.

So Summons Case No. 1443 of 1977 came up once again in the Magistrate's Court on 6 October 1986, this time before the Magistrate Azmi bin Ahmad. Once again Encik Bernatt took his so called preliminary objection. Reference was made to the Registrar of Company's letter and the fact that it was not Narakera but somebody else who pleaded guilty to the charges. But the PO relied on the fact that it was Narakera who was the company's representative present in Court when the instalments were ordered, that he had not taken steps to see that the company complied with the order, and that he should be committed straightaway since the EPF arrears were recoverable as a fine.

With this the Magistrate agreed and ordered him remanded in custody. A stay of execution was refused "as this was a pleading guilty case."

Once again Mr. Narakera gave notice of appeal this time citing the Public Prosecutor as respondent. The decision appealed against is "whereby the appellant's application on a preliminary point of law was dismissed and the appellant imprisoned till payment of RM74,553."

On the same day his solicitors applied to the Judge of the High Court who released the appellant on his own recognisance pending the hearing of this appeal.

The learned Magistrate did not write his judgment till 15 August 1988 very nearly two years after he made his order. There was such serious disagreement as to what actually he decided that I called for the records of the lower Court.

In his written grounds of judgment he says he ruled "the defendant should be remanded for a period of nine months.' The typewritten notes of evidence which contain blanks makes this part of the proceedings unintelligible. The material words in the original notes read, "I therefore ordered that the defendant be remanded in prison/or allow the application by the prosecution." These words are followed by the writing "in default of payment for three months." I am far from satisfied either with the legibility or the accuracy of these notes as a record of what actually happened. Indeed the file cover reads, "Imprisonment till

RM74,553 is paid up,", and in the circumstances I must give credence to Encik Narakera's notice of appeal as to what the learned Magistrate actually did that is he put Mr. Narakera behind bars and left him with the impression that he would have to stay there till the fine was paid!

The main issue in this appeal goes to the validity of the order of imprisonment made and the personal liability, if any, of Encik Narakera to pay "a fine" which was the primary responsibility of the company. Some collateral matters must be got out of the way first.

All prosecutions under the Criminal Procedure Code are under the control and direction of the Public Prosecutor. It is therefore in his name that criminal proceedings must be initiated. (See s. 376 of the Code). Section 128(1)(a) of the Code empowers a Magistrate to take cognisance of an offence upon receiving of a complaint as defined by the code. Section 133(2) exempts from being examined on oath, a public servant making a complaint in his official capacity. Section 380(1) of the Code empowers public officers to prosecute cases which they are, by any written law authorised to prosecute. Section 18 of the EPF Act confers such authority upon EPF officers, if so authorised, by the Chairman of the EPF Board. These then are the provisions whereby Encik Kanesalingam filed his complaint and initiated these proceedings which were subsequently prosecuted by the respective EPF officers who appeared before the Magistrate. Consequently the first notice of appeal naming Encik Kanesalingam as the respondent to the appeal was completely misconceived.

This first notice was an appeal "against the decision of the learned Magistrate...whereby the appellant's application on a preliminary point of law was dismissed..." These words are extracted from the notice of appeal, and the fact that the learned Magistrate dignified this notice with a judgment shows a misconception of elements which are basic to our Code.

Appeals to the High Court are provided for by Chapter XXX of the Code. By s. 305 where an accused person has pleaded guilty and been convicted there can be no appeal except as to sentence. By s. 307 of the Code, (subject to s. 305) any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order.

The parameters of what is appealable has been the subject of previous decisions. In *PP v. R.K. Menon & Anor.* [1978] 2 MLJ 152 it was held that there is no right of appeal against a procedural ruling by a Subordinate Court in the course of a criminal trial. (The objection there was the absence of a complaint under s. 129(i)(b) of the Code). In *Maleb b. Su v. PP, Cheak Yoke Thong v. PP* [1984] 1 CLJ (Rep) 87 the Court held that an order which did not finally dispose of the rights of the parties was not appealable. (The 'decision' objected to was the refusal of the Magistrate to disqualify himself). See also *Indran & Anor. v. PP* [1985] 1 MLJ 326.

So from any point of view the first notice of appeal was a non-starter and the learned Magistrate should have rejected it and carried on with the matter to conclusion.

The present appeal also concerns a dismissal of a preliminary objection but with this difference. This time the learned Magistrate did make a final order. He held Mr. Narakera liable to pay moneys which the company had been ordered to pay and he sent Mr. Narakera to jail.

The named accused in this case was the company and the company alone. The company stood convicted on a plea of guilty which was proferred in the presence of its Counsel and

Mr. Ramani as its executive consultant. There is a lacuna in the code as to how a corporation is to plead to a criminal charge. Section 5 of the Code however imports English Law. Applying s. 33 of the Criminal Justice Act 1925 I hold that the company's representative can plead for it. In this case Mr. Narakera as managing director appeared subsequently and ratified the plea by his conduct. So nothing turns on this except to suggest that in future cases and until the law is amended, a plea from a corporation should be taken in writing by the company's representative and in the absence of the same, a plea of not guilty be entered and the trial proceeded therewith.

Encik Bernatt has attacked the order requiring the company to pay RM74,533 when the six charges only totalled RM275. He says that under s. 16A(4) of the EPF Act no such order could be made unless this amount had first been certified to be due. As to this I observe that such an order is specifically made appealable by s. 16A(4) and no appeal was filed against it by the company within the appeal period or at all. As to the absence of any mention of a certificate in the notes of evidence, I have called for the Magistrate Court's file and satisfied myself that such a certificate together with the complete records showing how the RM74,533 was arrived at was tendered to the Magistrate who made this order on 17 August 1978.

Coming now to the proceedings on 6 October 1986, the effect of the "preliminary objection" was to ventilate a legal argument about the abatement of all criminal liability as on 22 October 1981 because the company was wound-up on that date. No evidence whatsoever was led, and the alleged justification for the Magistrate's order and imprisonment of Mr. Narakera has to be found in s. 18(2) of the EPF Act.

Narakera found himself on the firing line because he appeared in 1978 to negotiate terms of the payment of the arrears, and was served with the notice under s. 283 of the Code on 21 April 1981.

Section 350 of the Companies Act provides for service of documents on a company by sending the same to its registered office. I have not been able to find any specific provision in the code as to service of summons in criminal matters upon corporations. Relying on s. 5 of the Code one can resort to r. 76(3) of the English Magistrates' Court Rules 1952 but that provides for service on the clerk or secretary of the corporation. Service on a director does not appear to be covered by any special statutory provision.

Section 16A(4) does provide that the arrears ordered to be paid "shall be recoverable in the same manner as a fine...

Section 283(i)(b) of the Code in material particular reads:

> Where any fine is imposed ... then the provisions following shall apply (that is to say):
>
> (b) in every case in which the **offender** is sentenced to pay a fine the Court ... may ...:
>
> (1) allow time for the payment of the fine;
>
> (2) direct payment of the fine to be made by instalments.
>
> (3) direct that in default of payment of the fine the offender shall suffer imprisonment for a certain term.

The maximum term of imprisonment for an offence under s. 16A(1) of the EPF Act is twelve months. So by s. 283(i)(c) of the Code the maximum imprisonment period for the default cannot exceed six months.

These sections only empowered the imprisonment of the offender. Here the offender was

the company, which being an incorporeal person could not be imprisoned in any case.

In any case the death of a person who has been fined and died without paying is still recoverable from the personal representatives of the deceased person since the fine creates a debt of record to the State. See *H.M. Treasury v. Harris* [1957] 2 QB 516. See also s. 17 of the EPF Act which makes contributions recoverable as a civil debt without prejudice to any other remedy.

The Singapore Criminal Procedure Code s. 267(b)(ii) which corresponds to s. 283(i)(b)(2) contains a proviso whereby the Court is empowered before, allowing time for payment of a fine, or directing it to be paid by instalments, to require the offender to execute a bond with or without sureties and in the event of default the Court may issue a warrant for the arrest of the offender. We should do the same.

But in our case nothing like this happened when the original order was made. The notice which was issued does not follow any particular form prescribed by the code.

At the hearing there was no proper evidence before the Magistrate as to the company being defunct. Letters even from the Registrar of Companies are not documents of which the Court must take judicial notice. They have to be proved in the usual way. So the so called preliminary objection was without a proper foundation.

The prosecuting EPF officer however successfully persuaded the learned Magistrate that the inability to get at the company was no bar to getting immediately at Mr. Narakera because he was the managing director of the company who had negotiated the instalments terms in question.

This was done by resort to s. 18(2) of the EPF Act which reads as follows in material particular:

> Where an offence under this Act...has been committed by a body corporate...any person who at the time of the commission of the offence was a director...of the body corporate... shall as well as such body corporate...be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence...

It is the considered opinion of the Court that before resort can be had to this section the director of the corporation in question has to be formally charged and the ingredients of the section proved against him. The two ingredients required to make out a *prima facie* case are that the company has committed the offence and secondly that the director was a director at the time the offence was committed.

By transposing Mr. Narakera into the shoes of the company, as if he were its alter ego, without any evidence whatsoever before him of the second ingredient the Magistrate did something which was totally impermissible in law. Had he been formally charged it would have been open to Mr. Narakera even if he had been a director at the time, to give evidence of due diligence. The learned Magistrate pre-empted this right. Furthermore the liability to pay the arrears of contributions recoverable as a "fine" was the liability of the company. It does not automatically pass on to its directors under s. 18(2) of the Act. What fine a director must pay be assessed after he is convicted for the offence of which he is to be deemed guilty. That liability is to the fine *per se.* The liability to pay arrears of contributions which shall be recoverable as a fine is a liability of the employer alone under s. 16A(4).

Consequently it follows that the order made by the learned Magistrate was a nullity and I

hereby set it aside. I would add that in any event the default sentence be it of indefinite duration as set out in the notice of appeal or of nine months as set out in the grounds of judgment supplied nearly two years later, is also a nullity. I would further add with respect, that these views are consonant with the decision of the High Court in *Pontian Bas Berhad v. PP* [1987] CLJ (Rep) 834 and on reference to the **Supreme Court** at [1988] 2 SCR 38.

The EPF authority is not by this judgment precluded from proceeding against all the persons who were directors, managers, secretary or purporting to act as such at the time the offences charged were committed that is between 30 November 1975 and 30 June 1977. It would seem that their identities are known and they are readily available.

But so far as Mr. Narakera and the law is concerned this case proves beyond a doubt that a little learning is a dangerous thing. The unwarranted actions which were initiated by the relevant officers of the EPF, even if it be in good faith, have caused Encik Narakera, not only his loss of liberty but a great deal of expense, trouble and loss of time. He undoubtedly deserved a lot better from all the people who have had anything to do with this case.

Section 427 of the Criminal Procedure Code provides for the payment of expenses and compensation to those who have been unwarrantedly put to such adversity, such payment to be made out of the consolidated fund. But this was a prosecution intiated by the EPF albeit in the name of the Public Prosecutor, the complainant was the EPF. Section 322 of the Code gives this Court power to award costs to be paid by the complainant. Even though Mr. Narakera was never formally accused he was treated as such. In the unusual circumstances of this case I deem it fit that the Employees Provident Fund Board do pay Encik Narakera the sum of RM5000 to reimburse him for the costs, expenses and trouble to which he has been put.

The Magistrate's Court file will remain in the custody of this Court until otherwise ordered.

Also found at [1990] 2 CLJ 226